

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

A & C LANDSCAPING, INC.
aka A & C CONSTRUCTION, INC.
316 Paseo Tesoro
Walnut, CA 91789

Employer

Docket Nos. 04-R4D4-4795
and 4796

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On June 9, 2003, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by A & C Landscaping, Inc. aka A & C Construction, Inc. (Employer) at 2629 Rocky Trail Road, Diamond Bar, California following a fatality arising from a trench collapse.

On November 21, 2003, the Division issued citations to Employer alleging multiple violations of safety orders found in the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ Among the alleged violations, citation no. 5 alleged a willful-serious violation of section 1541(k)(2) [failure to remove exposed employees from a trench subject to possible cave-in] and citation no. 6 alleged a willful-serious violation of section 1541.1(a) [failure to ensure that each employee in excavation was protected from cave-in]. The proposed penalty for each violation was \$70,000.

Employer filed timely appeals contesting the classification of the violations, the abatement measures, and the reasonableness of the proposed civil penalties.

¹ Unless otherwise specified all section references are to Title 8, California Code of Regulations.

An evidentiary hearing was held on April 19, 2006 before an Administrative Law Judge (ALJ) for the Board. At hearing, the Division's motion to reduce the penalties for citation nos. 5 and 6 from \$70,000 to \$54,000 was granted. On May 23, 2006, the ALJ issued a decision denying Employer's appeals except as to citation no. 4. The ALJ assessed penalties totaling \$124,800 for the remaining violations.

Employer subsequently filed a petition for reconsideration seeking financial hardship relief, which the Board denied because Employer first raised the issue on reconsideration. On June 22, 2006, without knowing of Employer's petition, the Board independently took reconsideration of the ALJ's decision with respect to citation nos. 5 and 6. The Division filed an answer to the Board's Order of Reconsideration on July 19, 2006. Employer did not file an answer.

EVIDENCE

On June 9, 2003, a trench collapse resulted in a fatal injury to one of Employer's workers. Employer was working on an 80-foot by 10-foot trench that was 14-feet or more deep and lacked any form of shoring on the vertical walls, which were cut at a 90% angle. While a worker was in the trench, the vertical cut caved in without warning and engulfed him. The soil was type B, but arguably was more appropriately considered type C because of the presence of previously disturbed soil. Two unsupported palm trees, each weighing approximately two to three thousand pounds, were located along the edge of the vertical cut. The trees' weight in proximity to the vertical cut increased the chance of a cave-in. In addition, there was a prior un-compacted excavation forming part of the vertical cut that contained two pipes protruding into the trench.

Roger Yang, Employer's owner and the individual responsible for the project, had inspected the trench on the morning of the accident, so knew its condition. He was knowledgeable about trenching and protective systems, and was found to be a "competent person" as defined by section 1504(a).² The evidence reflects that both he and Martin Orozco, Employer's foreman, knew the un-shored trench was very dangerous.

ISSUE

Was the imposition of separate penalties for the two willful trenching violations proper?

² A competent person is, "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

Section 1541(k)(2) states,

Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

Section 1541.1(a) states, in pertinent part,³

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c) . . .

Each of these safety orders requires employees to be protected from cave-ins by removing them from the trench or providing an appropriate protective system.

For over thirty years, the Board has repeatedly found it proper to assess one penalty for multiple violations involving the same hazard where a single means of abatement is needed. (e.g., *Western Pacific Roofing Corp.*, Cal/OSHA App. 96-529, Decision After Reconsideration (Oct. 18, 2000); *San Francisco Newspaper Agency*, Cal/OSHA App. 93-0319, Decision After Reconsideration (Dec. 20, 1996); *Golden State Erectors*, Cal/OSHA App. 85-0026, Decision After Reconsideration (Feb. 25, 1987); *Pace Arrow*, Cal/OSHA App. 78-1016, Decision After Reconsideration (Nov. 19, 1984); *Strong Tie Structures*, Cal/OSHA App. 75-856, Decision After Reconsideration (Sept. 16, 1978).) The Board has held penalties which tend to be duplicative or cumulative, and are not needed to effectuate abatement, inconsistent with the spirit and intent of the Act. (*Strong Ties*, *supra*; *Western Pacific Roofing Corp.*, *supra*.) As the Board stated in *Strong Ties*, *supra*, “[t]here appears to be no reason why an employer should pay what is essentially a double penalty for what is in reality a single hazardous situation.” While multiple citations involving a single hazard are appropriate and typically will be upheld, the same is not true for duplicative penalties. (e.g., *West Valley Construction Co., Inc.*, Cal/OSHA App. 01-3017, Decision After Reconsideration (May 16, 2008); *Western Pacific Roofing*, *supra*; *San Francisco Newspaper Agency*, *supra*.)

³ The safety order provides two exceptions, neither of which is applicable here.

We find this persuasive, well-established line of precedent governs this case. Here, the two safety orders cited pertained to a single hazard (exposure of employees to an unprotected trench) and a single form of abatement would have eliminated the hazard (a proper protective system or removal of the employees from the trench.) While we affirm the willful-serious violations of sections 1541(k)(2) and 1541.1(a), we vacate the \$54,000 penalty imposed for the latter violation.

DECISION AFTER RECONSIDERATION

The Board vacates the \$54,000 penalty for the section 1541.1(a) violation as duplicative of the section 1541(k)(2) violation penalty and affirms the ALJ's decision in all other respects. The Board assesses total penalties of \$70,800 in this case and reinstates the ALJ's decision except as specified.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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